

1 SHEPPARD, MULLIN, RICHTER & HAMPTON LLP
A Limited Liability Partnership
2 Including Professional Corporations
NEIL A.F. POPOVIC, Cal. Bar No. 132403
3 MEREDITH A. JONES-MCKEOWN, Cal. Bar No. 233301
LAI L. YIP, Cal. Bar No. 258029
4 Four Embarcadero Center, 17th Floor
San Francisco, California 94111-4109
5 Telephone: 415-434-9100
Facsimile: 415-434-3947
6 npopovic@sheppardmullin.com
mjonesmckeown@sheppardmullin.com
7 lyip@sheppardmullin.com

8 Attorneys for Defendant
DATA PROCESSING SYSTEMS, LLC

9 UNITED STATES DISTRICT COURT

10 NORTHERN DISTRICT OF CALIFORNIA

11 AMBER KRISTI MARSH and STACIE
12 EVANS, individually and on behalf of a
class of similarly situated persons,

13 Plaintiffs,

14 vs.

15 ZAAZOOM SOLUTIONS, LLC, a
16 Delaware Limited Liability Company,
ZAZA PAY LLC, a Delaware Limited
17 Liability Company dba DISCOUNT WEB
MEMBER SITES, LLC, Unlimited Local
18 Savings LLC, WEB DISCOUNT CLUB,
WEB CREDIT REPT. CO.,
19 MEGAONLINECLUB, LLC, and
RAISEMONEY FOR ANYTHING;
20 MULTIECOM, LLC, a Colorado Limited
Liability Company dba ONLINE
21 DISCOUNT MEMBERSHIP, WEB
DISCOUNT COMPANY, and LIBERTY
22 DISCOUNT CLUB; ONLINE
RESOURCE CENTER, LLC, a Delaware
23 Limited Liability Company dba Web
Coupon Site, USAVE COUPON, and
24 UCLIP, MOE TASSOUDJI, an individual,
BILL CUEVAS, an individual, FIRST
25 BANK OF DELAWARE, a Delaware
Corporation; FIRST NATIONAL BANK
26 OF CENTRAL TEXAS, a Texas
Corporation; SUNFIRST BANK, a Utah
27 Corporation; JACK HENRY &
ASSOCIATES, INC., a Delaware
28 Corporation dba PROFITSTARS;

Case No. CV-11-5226 (YGR)
San Francisco County Superior Court
Case No. CGC-11-510815

**DATA PROCESSING SYSTEMS,
LLC'S NOTICE OF JOINDER AND
JOINDER IN PENDING MOTIONS;
MEMORANDUM OF POINTS AND
AUTHORITIES**

Complaint Filed: May 9, 2011
Trial Date: None Set

1 AUTOMATED ELECTRONIC
2 CHECKING, INC., a Nevada Corporation;
3 DATA PROCESSING SYSTEMS, LLC, a
Delaware Limited Liability Company and
DOES 1-10, inclusive,

4 Defendants.

5
6 TO THE COURT, ALL PARTIES, AND THEIR ATTORNEYS OF
7 RECORD:

8 PLEASE TAKE NOTICE that defendant Data Processing Systems, LLC
9 ("DPS") hereby joins:

- 10 1. the pending motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(1) and (6)
11 filed by defendants Zaazoom Solutions, LLC, Zaza Pay LLC, and Automated
12 Electronic Processing Systems, Inc., in its entirety, and
- 13 2. the pending motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6) or, in the
14 alternative, for a more definite statement pursuant to Fed. R. Civ. P. 12(e)
15 filed by defendant First Bank of Delaware, with respect to its argument
16 regarding plaintiff's third claim for relief (violation of Electronic
17 Communications Privacy Act, 18 U.S.C. § 2510, *et seq.*),
18 both of which are set for hearing on February 28, 2012.

19 This joinder is based on the attached Memorandum of Points and Authorities,
20 this notice and joinder, all of the pleadings and records in this action, and such other written
21 and/or oral material as DPS may present at or prior to any hearing before this Court.
22
23
24
25
26
27
28

1 Dated: February 13, 2012

2 SHEPPARD, MULLIN, RICHTER & HAMPTON LLP

3
4 By /s/ Neil A.F. Popović
5 NEIL A.F. POPOVIĆ
6 MEREDITH A. JONES-McKEOWN
7 LAI L. YIP
8 Attorneys for Defendant
9 DATA PROCESSING SYSTEMS, LLC
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

MEMORANDUM OF POINTS AND AUTHORITIES

Defendant Data Processing Systems, LLC ("DPS") joins: (i) the pending motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(1) and (6) filed by defendants Zaazoom Solutions, LLC, Zaza Pay LLC, and Automated Electronic Processing Systems, Inc. ("Zaazoom Motion"); and (ii) the pending motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6) or, in the alternative, for a more definite statement pursuant to Fed. R. Civ. P. 12(e) filed by defendant First Bank of Delaware ("First Bank Motions"), as follows:

1. DPS joins the Zaazoom Motion in its entirety. With respect to the argument therein that plaintiffs fail to state a claim upon which relief can be granted because they do not allege that the purported misconduct occurred in Arizona, DPS supplements the Zaazoom Motion as follows:

DPS neither resides in nor conducts business in Arizona, but is a citizen of and operates out of New York. Therefore, none of DPS's alleged misconduct occurred in Arizona.

2. DPS joins the First Bank Motions with respect to the argument therein that plaintiffs fail to state a claim upon which relief can be granted or are so vague and ambiguous in their allegations that a response cannot reasonably be prepared because: (i) the Electronic Communications Privacy Act, 18 U.S.C. § 2510, *et seq.* (the "Wiretap Act") does not provide for aiding and abetting liability; and (ii) plaintiffs fail to allege any facts sufficient to constitute an "interception" in direct violation of the Wiretap Act. DPS supplements the First Bank Motions with respect to this argument as follows:

Plaintiffs allege that they affirmatively provided their banking information to payday loan websites; they do not allege that their transmission of this information was in any way involuntary. Second Amended Complaint ("SAC") at 1. The Zaazoom Defendants¹ purportedly gathered this information from the payday loan websites; again,

¹ The SAC defines the "Zaazoom Defendants" as Zaazoom Solutions, LLC, Zaza Pay LLC, MultiECom, LLC, Online Resource Center, LLC, Moe Tassoudji, and Bill Cuevas.

1 plaintiffs do not allege that the payday loan websites' purported transmission of this
2 information was in any way involuntary. *Id.* According to plaintiffs, DPS, along with
3 other defendants, "provided material assistance" to the Zaazoom Defendants in creating
4 remote checks using this information, thereby implying that DPS came into possession of
5 such information; but yet again, plaintiffs do not allege that the Zaazoom Defendants'
6 purported transmission of information to DPS was in any way involuntary. *Id.*

7 Plaintiffs allege nothing more than that DPS received an electronic
8 communication voluntarily transmitted by the Zaazoom Defendants, which was in turn
9 voluntarily transmitted by the payday loan websites, which was in turn voluntarily
10 transmitted by plaintiffs, which cannot furnish a basis for liability under the Wiretap Act.
11 *See Crowley v. CyberSource Corp.*, 166 F. Supp. 2d 1263, 1269 (N.D. Cal. 2001)
12 ("completing a communication" does not constitute an "interception" within the meaning
13 of the Wiretap Act); *see also* Dkt. #65 (First Bank's Reply in Support of Motion to
14 Dismiss) at 14. Otherwise, this "would be akin to holding that one who picks up a
15 telephone to receive a call has intercepted a communication" and "effectively remove from
16 the definition of intercept the requirement that the acquisition be through a 'device.'" *Crowley*, 166 F. Supp. 2d at 1269.

17
18 As plaintiffs fail to allege any facts showing that DPS "intercepted" an
19 electronic communication within the meaning of the Wiretap Act, and no aiding and
20 abetting liability exists under the Wiretap Act for any alleged "material assistance" DPS
21 provided to the Zaazoom Defendants, this Court should dismiss pursuant to Fed. R. Civ. P.
22 12(b)(6) plaintiffs' third claim for relief for violation of the Wiretap Act or, in the
23 alternative, order pursuant to Fed. R. Civ. P. 12(e) that plaintiffs provide a more definite
24 statement of that claim.

1 Dated: February 13, 2012

SHEPPARD, MULLIN, RICHTER & HAMPTON LLP

2 By

/s/ Neil A.F. Popović

3 NEIL A.F. POPOVIĆ

4 MEREDITH A. JONES-McKEOWN

LAI L. YIP

5 Attorneys for Defendant

6 DATA PROCESSING SYSTEMS, LLC